BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BART BERRY	)	
Claimant	)	
V.	)	
	)	Docket No. 1,060,654
MIDWAY WHOLESALE	)	
Respondent	)	
AND	)	
	)	
GENERAL CASUALTY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the October 9, 2014, Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on February 3, 2015.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Rachel E. Nelson, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant failed to prove the July 14, 2011, accident was the prevailing factor causing his injury, medical condition and impairment. The ALJ determined it was more likely claimant aggravated his symptoms, but the law states the injury is "not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic." He determined the medical records reflect that claimant had a moderately to severely degenerated spine prior to his accidental injury of July 14, 2011. Additionally, claimant was reporting neck pain as early as February 1, 2010. The ALJ found it likely claimant aggravated his symptoms as a result of his July 14, 2011, accident, but the herniation of the cervical spine was more likely the product of claimant's degenerative condition rather than the July 14, 2011, accident.

Claimant appeals arguing the Board should find the new injury caused a structural change beyond claimant's preexisting condition and is therefore compensable. Claimant also contends the Board should find the prevailing factor for his injuries is the July 14, 2011, work-related accident, based upon the medical opinions of Drs. Prostic, Zimmerman and Hess. Claimant argues he is entitled to a work disability between 55 and 58 percent, and requests that future and unauthorized medical treatment be left open.

Respondent contends claimant's alleged injury merely aggravated or exacerbated his preexisting cervical condition or rendered that condition symptomatic. Respondent argues claimant is not entitled to work disability or future and unauthorized medical treatment because he failed to show he suffered an accidental injury arising out of and in the course of his employment and failed to meet his burden of proof that the accident was the prevailing factor in causing his cervical spine condition and need for treatment. Respondent requests the Award be affirmed.

The issues on appeal are:

1. Did claimant's injury arise out of his employment with respondent?

2. Was the accident the prevailing factor causing claimant's injury, medical condition and impairment?

3. If so, what is the nature and extent of claimant's injury and disability?

4. Should claimant be awarded future medical and unauthorized medical care?

FINDINGS OF FACT

Claimant began working for respondent in 2007 as a delivery driver. He denied any problems with his spine prior to going to work for respondent. Claimant testified he went to the VA for severe lower right hip pain in Christmas 2009. An MRI of the thoracic spine down to the lumbar spine was ordered and revealed two bulging disks. Claimant did not relate his hip pain to any kind of work activity or accident. Claimant indicated that in July 2011, he was still having symptoms in his lower and middle back. Claimant admitted his thoracic and lower back problems were present before the accident, but denies that a catch on the right side of his upper back was present before the accident.

An April 29, 2010, MRI of claimant's thoracic spine showed no acute fracture or subluxation within the spine. However, the MRI did show diffuse degenerative changes of the thoracic spine with disc protrusions at T6-7, T8-9 and T11-12, but no cord compression.

An April 29, 2010, MRI of the lumbar spine revealed L1-2 mild disc space narrowing, mild diffuse disco-osteophytic bulging and mild neuroforaminal narrowing bilaterally; L2-3, mild disc space narrowing, mild diffuse disco-osteophytic bulging and mild neuroforaminal

narrowing bilaterally; L4-5, mild diffuse disco-osteophyte bulging and mild neuroforaminal narrowing bilaterally; and L5-S1, mild, broad-based right foraminal and extraforaminal disco-osteophytic bulging, and mild right neuroforaminal narrowing.

On July 14, 2011, claimant was on light duty for his back symptoms, but was asked to help deliver a large sliding glass patio door because respondent was short handed. While claimant was helping to carry this door, he felt achy, but figured it was because the door was heavy. The next day, claimant went to work and went from being achy to being sore. He did not work July 16 or 17.

Claimant testified that on July 18, 2011, he attempted to get out of bed, but was stuck. He was unable to turn his neck from side to side and instead had to turn his shoulders completely to the side. To look up claimant had to lean back. He was able to get to work and reported these problems to Todd Zimmerman, the manager. He reported he was not sure what happened and requested to see a doctor.

Respondent sent claimant to Michael J. Geist, M.D., at Lawrence Occupational Health Services. Claimant first saw Dr. Geist on July 18, 2011, at which time he reported chronic back pain with the current pain in the thoracic region. Claimant told Dr. Geist that he thought his pain was from helping carry a glass patio door. Claimant testified that every time he would move he had pain between his right shoulder blade and his spine that felt like he had a rock stuck underneath the area. The pain was isolated in the mid to lower thoracic back and left parascapular region. Dr. Geist sent claimant for x-rays and physical therapy. Claimant was returned to work light duty, with a 5-10 pound lifting restriction. Claimant was examined by Dr. Geist on July 20, 2011, with similar complaints. He again returned to work, but his lifting was limited to 5 pounds.

When claimant returned to Dr. Geist's office on July 25, 2011, he was examined by Peter Bock, M.D. Claimant's pain was again located in the mid-thoracic region. Physical therapy was ordered and an MRI recommended. Claimant's work restrictions remained the same.

When claimant was examined on August 8, 2011, Dr. Geist noted complaints mainly in the lower mid-thoracic region. He diagnosed mainly an exacerbation of preexisting issues. Therapy and the previous restrictions were continued. The August 17, and August 29, 2011, examinations mirrored the August 8 exam and results. There are no references to claimant's cervical spine in any of the Dr. Geist medical reports.

Claimant indicated Dr. Geist never addressed his neck, as the focus was on the right thoracic area. When he was sent to ARC, the focus was on the middle and lower back. Claimant testified that he had neck pain which went down into his arms and he had numbness in his fingers that began as soon as the neck pain started.

Dr. Geist opined on September 19, 2011, that the prevailing factor causing claimant's alleged injuries was his preexisting underlying problems with his back for which

claimant was already seeking medical treatment. When last seen on August 29, 2011, claimant was at maximum medical improvement with regard to any possible exacerbation of his preexisting back issues.

Claimant met with Michel L. Smith, M.D., an orthopedic physician, on August 23, 2011, with complaints of lower back pain and discomfort in the thoracic and lower cervical region. There was also degeneration in the lumbar spine at L2-3 and L1-2. Claimant reported bending, standing, sitting, lifting, walking, lying flat, sneezing and coughing aggravated his pain. Dr. Smith diagnosed thoracic and lumbar spondylosis. He noted claimant was not "doing too bad, but it is starting to affect his ability to do his job."[1] Claimant was asked to consider a rheumatologic evaluation. Dr. Smith felt surgery was not an option and claimant should pursue conservative measures.

Claimant went to the VA for an unscheduled visit on November 8, 2011, with neck pain that hampered lateral rotation and with radiating pain into his arms. Claimant reported no history of cervical trauma. Claimant was found to have cervical radiculopathy and a CT of the cervical spine was ordered.

A November 10, 2011, MRI of cervical spine showed severe degenerative changes of the cervical spine mainly at C5-6 and C6-7, and a moderate to large disc osteophyte complex producing central canal stenosis at C5-6 with apparent ventral cord compression.

Claimant received a letter from the insurance company on November 16, 2011, stating any further medical treatment under workers compensation was denied based on Dr. Geist's opinion that preexisting middle and low back problems were not caused by his work and that work was not the prevailing factor in those problems. Claimant understood that this meant his claim was being denied, and he made an appointment with the VA. Claimant went to the VA, on November 21, 2011, for a neurosurgery consultation. At the time, he had neck pain, left arm pain and side pain. The VA ordered an MRI of claimant's neck, which revealed a herniated disk in the cervical spine. He was diagnosed with cervical radiculopathy. Claimant testified the disk was protruding and pressing against the spinal cord. A January 31, 2012, VA report from Dr. Marie Fowler indicated the MRIs, when compared, showed no significant change.

Claimant continued to work light duty for respondent until his employment was terminated January 25, 2012, because there was no longer any light duty available. Claimant did not work from January 26, 2012, to April 1, 2012. He began receiving unemployment benefits after April 1, 2012, and continued to receive unemployment as of the September 20, 2012, preliminary hearing. He had neck surgery on July 13, 2012, with Dr. Wolter from the VA. He continued to have neck problems after surgery and did not have full range of motion. He testified that in July 2012, his pain level in his neck and upper back was an 8 or 9 out of 10. At the time of the September 20, 2012, preliminary

[1] P.H. Trans. (Sept. 20, 2012), Resp. Ex. C at 2.

hearing, he had zero pain in his upper back and his neck pain was 4.

Claimant testified at the regular hearing his back feels better. He purchased an inversion table that seemed to help him more than physical therapy. His neck continues to bother him. Claimant has trouble moving his neck side to side and up and down, with looking up being worse. He gets tired if he tries to hold his neck up for too long. Since surgery, he no longer has loss of sensation going down into his arms. Claimant takes Valium and Hydrocodone as needed. He does not take the medication daily because he would not be able to function if he did. Claimant is aware he could have more trouble later and would like to be able to see a doctor in the future. Claimant denies any prior history of neck problems.

Claimant met with board certified orthopedic surgeon Alexander Bailey, M.D., on November 1, 2012, for an examination, at the request of respondent. Claimant's chief complaints at the time were neck pain and upper arm pain. Claimant reported the onset of his condition after lifting, bending and leaning against a sliding glass door he was delivering. Claimant reported he was not working because of his neck and back problems. Dr. Bailey noted claimant reported his thoracic and lumbar spine conditions were not work-related. Dr. Bailey took x-rays, reviewed the x-rays and the MRIs claimant brought to the exam and asked claimant questions.

Dr. Bailey determined claimant was doing well post surgery and expected to be released to regular duty in January 2013. In his report of November 1, 2012, he stated:

> . . . the patient's medical record file at the VA of specific nature identifies a variety of pain complaints in this patient dating well back preceding 07/14/11. There are various descriptions of low back pain, mid back pain, extension of pain into the parascapular and shoulder blades, into the neck. The patient has received multiple MRIs, injection therapies, physical therapy for what is described as chronic, longstanding history of pain. MRI and x-ray scans have indicated generalized, moderate-to-severe spondylosis in the thoracic and lumbar spine. The patient describes handwritten documents following the purported injury of flank pain well below the shoulder blade region. Thoracic back pain can be an extension of cervical neck pain or vice versa. There are descriptions of moderate-to-severe degenerative changes in the medical record as well as objective imaging studies. At some point following 07/14/11, there are descriptions of neck pain, parascapular pain and vague representation of arm symptomatologies. An MRI scan is performed following 07/14/11 indicating spondylosis, severe degenerative changes and spinal stenosis at C5-6 and C6-7. The patient subsequently undergoes a 2-level anterior cervical decompression with resolution of a portion of the patient's generalized pain symptomatologies and conditions.
>
> The patient, in my opinion, has been appropriately evaluated and treated for a number of years. The patient has described various pain symptomatologies.[2]

[2] Bailey Depo., Ex. 2 at 8-9.

In terms of causation, Dr. Bailey opined claimant has a degenerative condition, a personal medical condition which is not directly related to a purported work-related injury or event on July 14, 2011. He did not believe claimant's acutely herniated discs at C5-6 and C6-7 were work-related. This is a generalized degenerative condition that has extended over a number of years, coupled with the thoracic and lumbar spinal conditions. Dr. Bailey found the prevailing factor for claimant's need for medical and/or surgical treatment to be related to claimant's personal medical condition and the degenerative conditions of the cervical, thoracic and lumbar spines, and not directly related to the July 14, 2011, work accident.

Dr. Bailey's diagnoses were: degenerative cervical spondylosis; degenerative thoracic spondylosis; degenerative lumbar spondylosis; cervical spinal stenosis, C5-6, C6-7, treated with appropriate anterior cervical decompression and fusion to positive outcome; carpal tunnel syndrome identified on electromyogram (EMG) studies; chronic pain symptomatology. In lay terms, claimant has a highly degenerative cervical spine with tightness against his neurologic structures, including his spinal cord and existing nerve roots. In terms of treatment, he recommended exercise, anti-inflammatories, medication management as necessary and avoid surgical intervention if at all possible.

Dr. Bailey testified the work event did not alter the natural history of claimant's degenerative condition and did not believe claimant's condition was causally related to the work accident. Dr. Bailey rated claimant with a 0 percent permanent partial disability to the body as a whole as it directly and solely relates to the July 14, 2011, injury. He felt claimant would continue to have problems over time. This rating was based on the 4th Edition of the AMA *Guides*.[3]

Claimant met with Edward Prostic, M.D., on May 14, 2012, for an examination. Claimant complained of pain in the back of his neck, going into his shoulders and upper back and down into his right elbow. He reported numbness and tingling in both hands which wakes him up at night and occurs while he is gripping the steering wheel. Dr. Prostic found claimant sustained injury to his cervical spine with a herniation of the disc at C5-6 on the right and claimant continues with unacceptable neck symptoms. He diagnosed claimant with bilateral carpal tunnel syndrome and ulnar tunnel syndrome. He determined claimant would likely need bilateral carpal tunnel releases in addition to a cervical discectomy and fusion. He opined the work-related accident of July 14, 2011, is the prevailing factor in claimant's need for treatment.

Claimant received unemployment benefits for much of 2012 while he looked for employment. When he could not find work, he started his own business in December 2012, helping title vehicles for people. He then took a job at Affordable Storage with his

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

mother and stepfather, performing maintenance on the grounds and buildings. Claimant testified it was light maintenance, so he was able to do the work, making $338 a week.

Claimant met with Daniel Zimmerman, M.D., at the request of his attorney, on March 22, 2013, for an examination. His chief complaint was neck pain. Claimant reported developing pain and discomfort affecting the cervical and upper thoracic spine on or about July 14, 2011, while working for respondent. Claimant reported continued pain and discomfort affecting the cervical spine and cervical paraspinous musculature. Claimant had restricted cervical range of motion and pain and discomfort to palpation over the cervical spine. Claimant denied any prior problems with his cervical or thoracic spine. He admitted to earlier problems at the lumbar level. Claimant did not recall the prior treatment with the VA, but admitted he has trouble remembering things.

Dr. Zimmerman acknowledged in his report that when claimant met with Dr. Geist on July 20, 2011, complaining of diffuse tenderness in the mid to lower thoracic back and left parascapular region, it was indicated claimant had adequate range of motion of his neck and back, but increased discomfort with range of motion.

Dr. Zimmerman indicated it is possible claimant's shoulder pain, weakness and pain in the left biceps relates to his cervical spine. Dr. Zimmerman indicated that VA records from February 1, 2010, show claimant complained of his pain being aggravated by rotation of his neck, right and left, which is not consistent with what claimant reported to him on March 22, 2013. Claimant denied any preexisting neck symptoms. Dr. Zimmerman testified there was no way to know from the VA records whether claimant actually had neck problems.

Dr. Zimmerman opined claimant sustained injury affecting the cervicothoracic spine on July 14, 2011, while carrying out work duties for respondent. He was seen for pain and discomfort affecting the cervical and thoracic spine. Claimant's MRI revealed significant disc abnormalities at C5-6 and C6-7. X-rays suggested claimant had surgery at C6-7.

Dr. Zimmerman opined the prevailing factor for the cervical disc disease at C5-6 and C6-7 is the July 14, 2011, accident. He determined due to permanent residuals of the surgically treated cervical disc disease, claimant sustained a permanent partial impairment of 18 percent to the whole body, pursuant to the 4th Edition of the AMA *Guides*.

Dr. Zimmerman found claimant's condition to be stable and did not believe further diagnostic or therapeutic intervention was warranted. Claimant was found to be at maximum medical improvement, but claimant might need future medical treatment.

Dr. Zimmerman limited claimant to lifting 20 pounds occasionally and 10 pounds frequently. Claimant should avoid hyperflexion and hyperextension of the cervical spine, or holding the cervical spine in captive positions for extended periods of time to avoid increased pain and discomfort. Claimant's pain and discomfort could be treated with aspirin, Tylenol or other over the counter non steroidal anti-inflammatory medication. Pain

and discomfort could also be treated with heat in the form of hot tub baths, hot showers and/or heat locally applied. This treatment would be self directed by claimant.

Dr. Zimmerman reviewed the task list prepared by vocational expert Dick Santner and opined claimant could no longer perform 13 out of 16 tasks for an 81 percent task loss.

Dr. Zimmerman acknowledged he knew nothing about claimant's 1993 and 1998 motor vehicle accidents. Claimant testified that in 1993 he was riding in a vehicle with his boss in California when they were struck by a drunk driver. Claimant suffered injuries to his knee, shoulder and elbow. He did not seek any medical treatment as he testified to just being really stiff. On January 15, 1998, claimant went to Stormont Vail after a vehicle accident on October 26, 1997. As a result of the accident, claimant had an immediate onset of pain in the cervical and thoracic spines with limited range of motion and pain in the lower rib cage bilaterally. Claimant also complained of muscle tension in the neck and back and his pain level was a 6 out of 10. Dr. Zimmerman had no opportunity to review those prior medical records.

Claimant continues to work for the family business, Affordable Storage, performing light maintenance work earning $15 an hour. At some point he will take over the business. Claimant testified when he takes over the business he will be taking care of the books, taking care of the contracts, sweeping out and renting the storage units and performing light maintenance and yard work.

Claimant was attending Washburn Tech full-time to be an auto technician, expecting to graduate in December 2014. He was training to be a service writer, which is someone who fills out the paperwork and gives it to the mechanics.

Claimant testified his current physical difficulties are an inability to look up and difficulty turning his head side to side. He can no longer ride a motorcycle, play softball, hunt or climb tree stands or operate a riding lawn mower. He can drive a car if he is cautious. He does have to turn completely in his seat to look behind him to see in his blind spot.

Claimant met with neurosurgeon, Harold Hess, M.D., on October 16, 2013 and November 7, 2013, for a court-ordered IME. It was Dr. Hess' understanding that claimant ended up with an ache in his neck that progressed to significant neck pain and stiffness that radiated into the right scapula and right arm, the day after carrying a sliding glass door at work, on July 14, 2011.

Dr. Hess found no mention of neck pain in Dr. Geist's reports. According to the pain diagram, claimant's pain was in the scapula area. He testified it is typical to see neck pain in addition to intrascapular pain, but he has also seen scapular pain develop into neck pain. Dr. Hess acknowledged that in 2010 and after the accident, claimant complained of pain aggravated by rotation of neck right and left.

Dr. Hess testified that without a dedicated cervical MRI, it is difficult to get a true definition of the size or relevance of problems in the cervical spine. To get full detail of an area, the MRI must be focused in that area. Dr. Hess did agree the 2010 MRI would show a bulge, but not the extent of the bulge.

Dr. Hess noted claimant has suffered mid-back pain since 2009, but claimant did not report the cause of the back pain. Claimant did not mention to Dr. Hess his back problems from 1998. Claimant's VA records from 2010 indicate claimant reported back, neck and shoulder pain.

From his review of the records, Dr. Hess believed he saw a number of instances where claimant complained of neck pain, arm aching and shoulder pain, which would relate to a cervical spine injury. He testified that if claimant was not complaining of prior neck pain and arm pain and if his scapular pain was isolated to 2010 and wasn't ongoing up until the date of the accident, he would still say that the accident is the prevailing factor to claimant's cervical condition. However, he also agreed that chronic scapular pain is often from the cervical spine. Ultimately, Dr. Hess opined the prevailing factor for the herniated discs in claimant's neck and the resulting treatment and disability is the work-related injury carrying the glass door.

Dr. Hess later admitted seeing a medical record from March 30, 2010, indicating claimant complained of neck pain prior to the work accident. Dr. Hess testified it is not so much a matter of claimant having neck pain just prior to the accident, but is a matter of claimant having neck pain on an ongoing basis. From March 2010 to July 2011 claimant did not see anyone for any symptoms, including his neck or thoracic spine.

On March 28, 2014, Dr. Hess diagnosed cervicalgia, and brachial neuritis or radiculitis. Claimant's FCE showed him able to work at the medium demand level. Claimant was found to be at maximum medical improvement.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the

claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(B) states:

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
. . .
(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

This record supports the finding by the ALJ that claimant suffered neck pain as early as February 1, 2010. Additionally, claimant's complaints of neck pain with rotation to the right and left existed both before and after the work-related accident. Claimant has extensive degeneration throughout his entire spine. While the earlier MRI did not fully display the cervical spine, it did display enough to show the degeneration extended above the thoracic spine.

The Board finds it significant that claimant failed to mention his neck for several weeks after the accident. Additionally, the neck symptoms did not appear for several weeks, with the initial reports involving the areas between the shoulder blades and below. Dr. Geist, the initial treating physician, determined the prevailing factor causing claimant's problems was his pre-existing underlying problems with his back for which he had been seeking medical care.

The Board finds the medical opinions of Dr. Bailey and Dr. Geist to be the most persuasive. Claimant has failed to prove the accidental injury on July 14, 2011, was the

prevailing factor causing his injury, medical conditions and resulting disability or impairment.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove the accident of July 14, 2011, was the prevailing factor causing claimant's injuries, medical condition and impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 9, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge